PUBLIC INTEREST TEST – THE "CATCH ALL" EXEMPTION

Government Code section 6255 allows public agencies to withhold records when, "on the facts of the particular case, the public interest served by nondisclosure clearly outweighs the public interest served by disclosure of the record." As the California Supreme Court has stated: "[T]his provision contemplates a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality."[1]

The catch-all exemption, or "balancing test," has resulted in the creation of what is known as the "deliberative process privilege." The balancing test has also been applied or rejected in certain cases addressing particular records.

(1) Deliberative process privilege. The "deliberative process privilege" may exempt disclosure of records revealing the deliberations of government officials or information relied upon by the officials in making decisions that they would not otherwise receive if the information were routinely disclosed. According to the California Supreme Court, which created the deliberative process privilege in 1991, "the key question in every case is whether disclosure of the materials would expose [the government's] decision-making process in such a way as to discourage candid discussion with the [public officials] and thereby undermine the [government's] ability to perform its functions." [2]

It is important to note that the deliberative process privilege is not an absolute bar to the disclosure of records that may reveal an official's deliberative process. The government must also apply the "balancing test" set forth in the Public Records Act. So, records may be withheld where, in addition to exposing the decision-making process, the public interest served by nondisclosure clearly outweighs the public interest served by disclosure of the record.

The deliberative process privilege has since been applied in other contexts:

- *Records of telephone calls made by city council members from city-owned cellular phones and home offices over a one-year period*. The court said the records were exempt from disclosure pursuant to the deliberative process privilege: "Disclosure of the records sought will disclose the identities of persons with whom the government official has consulted, thereby disclosing the official's mental process."[3]

- *The names and qualifications of applicants for a temporary appointment to a local board of supervisors, necessitated by the death of an elected supervisor*. The court said the records were protected by the deliberative process privilege, and also as correspondence to the Governor's office (exempt under Government Code section 6254(l)): "The deliberative process privilege recognizes that the deliberative process can be impaired by exposure to public scrutiny. The disclosure of records containing only factual matters can impair the deliberative process by revealing the thought processes of the government decision maker. However, the deliberative process can be impaired in other ways as well. ... '[W]ithout the assurances of confidentiality ... flow of information

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1 *Michaelis, Montanari & Johnson v. Superior Court*, 38 Cal. 4th 1065, 1071 (2006).

2 *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1342 (1991).

3 *Rogers v. Superior Court*, 19 Cal. App. 4th 469 (1993).

to the [public agency] might be sharply curtailed, and the deliberative processes and efficiency of the agency greatly hindered.'"[4]

(2) Other records exempt or not exempt under the balancing test. Other types of records have been held to be exempt or non-exempt under the CPRA, using the balancing test.

- *Applications to carry concealed weapons.* The California Supreme Court ruled that applications to carry concealed weapons are a matter of public record based upon the importance of the public's interest in overseeing how such permits are being issued.[5]

- *State law enforcement surveillance records, where the burden of redacting exempt information justified nondisclosure*. Records may be exempt from disclosure if the information sought by a request is so voluminous it would result in inordinate time and costs to gather and segregate the information subject to disclosure.[6]

- *Names of sheriff's deputies involved in fatal shootings.* The court of appeal said that this information had to be made public. In doing so, it said: "Fear of possible opprobrium or embarrassment is insufficient to prevent disclosure. ... The perceived harm to deputies from revelation of their names as having fired their weapons in the line of duty resulting in a death does not outweigh the public interest served in disclosure of their names."[7] Note, however, that a subsequent decision of the California Supreme Court has called this decision into question.[8]

- *Names, addresses and telephone numbers of persons who have made complaints to the city about municipal airport noise*. This information was held to be exempt from disclosure under the balancing test. The court of appeal held that the privacy interests of the people complaining outweighed the interest in monitoring whether the government was appropriately addressing airport noise complaints.[9]

- *A list of water district customers who had exceeded their maximum allowed usage of water under a rationing program*. Despite concerns over privacy, the California Court of Appeals ruled that the privacy interests of the customers did ***not*** outweigh the right of the public to review the government's conduct. In this case, the newspaper wanted to determine how well the water district was enforcing the regulations against excessive water usage in a time of drought. The court also rejected as a "mere assertion" the

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4 *California First Amendment Coalition v. Superior Court (Wilson)*, 67 Cal. App. 4th 159, 171 (1998), quoting *Times Mirror Co. v. Superior Court,* 53 Cal. 3d at 1343. *See also Wilson v. Superior Court*, 51 Cal. App. 4th 1136, 1141 (1996).

5 *CBS v. Block*, 42 Cal App. 3d 646 (1986),

6 *ACLU v. Deukmejian*, 32 Cal. 3d 440 (1982).

7 *New York Times Co. v. Superior Court*, 52 Cal. App. 4th 97, 104 (1997).

8 *Copley Press, Inc. v. Superior Court*, — Cal. 4th —, 2006 WL 2506369, 2006 Daily Journal D.A.R. 11,839 (2006).

9 *City of San Jose v. Superior Court*, 74 Cal. App. 4th 1008 (1999).

concern posed by the district that customers whose names were published could be subjected to physical harm.[10]

- *Manual of government audit procedures.* A group of hospitals that had been determined by the Department of Health Services to be out of compliance with Medi-Cal sought to obtain the department's fiscal audit manual. The California Court of Appeal ruled that the public's interest in disclosure of the manual was clearly outweighed by the public interest in not allowing Medi-Cal providers to circumvent governing regulations by using the audit manual as a guide for "manipulating expenditure itemizations."[11]

- *Reports of pesticide spraying*. An agricultural field worker who suffered symptoms associated with potential pesticide misuse sought access to pest control operator reports from the local county agricultural commissioner. The county refused to release the reports, claiming the public interest in withholding the record — that future reports would be unreliable if the operators knew details of their pesticide mixtures would be open to their competitors — clearly outweighed the public interest in providing the information to the sick worker. The court of appeal ordered the release of the information. It recognized a public interest in ensuring that the worker obtained adequate medical care in understanding the effects of pesticides on humans.[12]

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10 *New York Times Co. v. Superior Court*, 218 Cal. App. 3d 1579 (1990).

11 *Eskaton Monterey Hospital v. Myers*, 134 Cal. App. 3d 788 (1982).

12 *Uribe v. Howie*, 19 Cal. App. 3d 194 (1971).